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Client Alert Vietnam

NEW DECREE ON TRADING ACTIVITIES IN VIETNAM – AN INSIGHT LOOK

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New Decree on trading activities in Vietnam – an insight look

On 15th January 2018, the Government of Vietnam issued Decree 09/2018/ND-CP detailing Law on Commerce and Law on Management of Foreign Trade regarding good trading activities and directly-related activities to good trading (Trading Activities) of foreign investors and foreign-invested enterprises in Vietnam (Decree 09).

Decree 09 has been enforced for nearly five months. It is now a good time to review first impacts to foreign investors and foreign-invested enterprises in conducting Trading Activities in Vietnam.

> Key issues

1. Business License requirement when acquiring a local company engaging in Trading Activities

Under Decree 09, when a foreign investor or a foreign-invested enterprise acquires charter capital of a local enterprise, the target enterprise requires obtaining a Business License if:

- The current business activities of the target enterprise require a Business License (cf. for more detailed analysis, cf. item 2 and item 3); and
- The acquiring company acquires up to the foreign-ownership threshold that requires a Business License.

The foreign-ownership threshold requiring a Business License set out by Decree 09:

- a) When a foreign investor acquires charter capital of a local enterprise, the target enterprise must obtain a Business License, irrespective of the foreign-owned ownership percentage after the acquisition.
- b) When a foreign-invested enterprise having from or more than 51 % of foreign-owned capital acquires 51 % or more charter capital of a local enterprise, the target enterprise must obtain a Business License.
- c) When a foreign investor and a foreign-invested enterprise having from or more than 51 % of foreign-owned capital, both acquire 51 % or more charter capital of a local enterprise, the target enterprise must obtain a Business License.

Decree 09 confirms that when a foreign investor acquiring a local trading company, a multi-layer holding structure aiming to dilute the foreign ownership less than 51 % in the target company could be workable in practice for both the buyers and sellers to avoid complex conditions precedents on licensing procedure for closing the deal.

2. Relaxation on activities required a Business License

Decree 09 has abolished Business License for three activities, comprising:

- a) Exporting
- b) Importing, except oils and lubricants
- c) Wholesaling, except oils and lubricants

FIEs exporting, importing and wholesaling (except oil and lubricants) are no longer required to obtain a Business License. They can export, import and wholesale in accordance with their registered investment objectives under the Investment Registration Certificate (IRC) and business activities under the Enterprise Registration Certificate (ERC), both issued by the local Department of Planning and Investment (DPI).

The new licensing authority for issuance of Business License and Retail Outlet Establishment License is now officially Department of Industry and Trade (DOIT).

Decree 09 has lifted the prohibition of FIE to trade certain restricted goods for distribution under the former decree, including:

- Importing or wholesaling of oil or lubricants may be considered for a Business License;
- Retailing of rice, sugar, articles with recorded images, book, newspaper, and magazines could be permitted for retailing by FIEs being granted retail rights at their own supermarkets, minimarts, or convenience stores.

These relaxed rules are welcomed by most FIEs.

3. Additional Activities requiring a Business License

Nevertheless and on the disappointing side, Decree 09 has added six new activities and services which are not directly related to Trading Activities but require a Business License. These activities and services were not governed by the previous decree:

- Logistic services, except logistic services sub-sectors committed by Vietnam in international treaties
- Goods leasing services excluding financial leasing and except leasing of construction equipment with operators
- Trade promotion services excluding advertising services
- Trade intermediation services
- E-commerce services
- Tendering or bidding services

If an FIE is performing an activity requiring a Business License yet it has no Business License, the FIE is required to apply for Business License when it applies to amend any contents in relation to the name, enterprise code, head office address, legal representatives, owners, capital contribution shareholder or founding shareholder, distributed goods in which these contents are registered in the Investment Registration Certificate, Enterprise Registration Certificate or document with equivalent legal validity. However in practice, the DOIT encourages the FIEs to apply for a Business License even the FIE does not carry

out any amendment to those contents registered in their license and there is no compulsory deadline for such application procedure.

4. E-commerce services require a Business License

Importantly, FIEs conducting e-commerce services from now must apply for Business License. However, there is no further official clarification as to what kind of e-commerce services subjected Business License (e.g. whether an FIE operating an e-commerce platform or e-commerce website must apply for Business License).

5. Removal of detailed HS Codes

In the past, the old Business License was granted with the detailed list of HS Codes for all products subjected to Trading Activities. As a practice, the custom has based on such pre-registered HS Codes to approve custom clearance for imported/exported goods of FIEs. And the FIEs were permitted to trade only goods with pre-registered HS Codes.

This is no longer the current practice. The new Business License replaces the pre-registered HS Codes by the detailed list descriptive names of goods and without HS Codes.

This new approach enables the FIEs to easily deciding its goods nomenclature at any time, in particular to FIEs operating with an e-commerce platform. No longer had the need to amend the Business License every time when the FIEs extends or reduces its scope of traded goods.

6. Registration FIE's shareholder(s) in Business License

The new Business License registers detailed information of all FIE's owner, capital contributing member or founding shareholder(s); while in the prevailing decree, there was none.

The FIE's owner, capital contributing member or founding shareholder(s) are registered with their full names, address, value, and percentage of foreign ownership in the FIE.

Any changes to these particulars require the amendment of Business License (in addition to the amendment of their IRC and ERC).

7. Compulsory Confirmation on no overdue tax debt

Whether the FIEs apply for first issuance or amendment of their Business License, they must include a document issued by the tax authority evidencing they have no overdue tax debts (No Overdue Tax Debt Confirmation). While in the prevailing decree, the FIEs were only required to submit evidence of fulfillment their corporate income tax

(CIT) only of the past two recent years when applying to amend its Business License. If it is a newly established FIEs with no tax records, the No Overdue Tax Debt Confirmation could be waived.

The compulsory No Overdue Tax Debt Confirmation is a new barrier for FIEs to amend its Business License, particularly in the case where the FIEs may encounter an ongoing whatever tax dispute with the tax authorities. In addition, the tax authorities might only issue a No Overdue Tax Debt Confirmation after their own verification procedures to all tax liabilities (i.e. CIT, Value-Added Taxes, Import/Export Duties, etc.), which consumes obviously huge time and cost for FIEs.

The FIEs should confirm its tax fulfillment status when applying for any amendments to Business License. Otherwise, the FIEs should avoid amending Business License, if possible.

8. Annual reporting obligations

From Decree 09, the FIEs must submit an annual consolidated report on Trading Activities instead of three separate reports on importing, exporting and trading as before.

The consolidated annual report must be submitted to the local DOIT, the Ministry of Industry and Trade (MOIT) and other relevant authorities no later than the 31 January each year.

The reported information includes detailed turnover and profit generated in the reporting years with respect to each activity of Trading Activities. These figures, which need to be accurate and consistent to the financial statement, might not be available before January each year since most FIEs usually finalizes and issues their audited financial statement on March.

Failing to submit the report, the FIEs could be withdrawn their Business License or Retail Outlet Establishment License(s). This strict sanction newly-introduced is a new burden for FIEs in complying with their reporting regime. The FIEs should be aware and schedule in advance for this compliance.

9. Retail Outlet Establishment License and Economic Need Test (ENT)

In addition to the Business License, the FIE(s) are required to obtain the Retail Outlet Establishment License, for each retail outlet and regardless of the first retail outlet (First Outlet) or outlets beyond the First Outlet.

The First Outlet is exempted from ENT when the FIE applies for Retail Outlet Establishment License, as always. Other exemptions to ENT are (i) outlets having under 500-meter square, (ii) outlets located in commercial center, (iii) minimarts or (iv) convenience stores. Such exemptions have brought out a great opportunity for FIEs to expand their distribution channels in convenience stores and minimarts, without any ENT restriction as previously.

Outlets beyond First Outlets are subjected to ENT. And in this sense, Decree 09 imposes a significant scope of "outlets beyond First Outlet", which includes all outlets set up under the same name, or trademark with the First Outlet owned by FIEs. This means any franchises outlet to be opened by the FIEs require an ENT approval. To such extent, FIEs must pass the ENT and obtain the Retail Outlet Establishment License, for each franchise outlet already set up or franchised, even these outlets may be owned 100 % by a local investor.

However, for European investors, it might be interesting to know that under the EU-Vietnam Free Trade Agreement signed by Vietnam lately on 2017 (EVFTA), the ENT will be abolished after five years from EVFTA's entrance in force. If the EVFTA could be approved by EU and Vietnam expectedly in 2018, European investors, particularly German investors, shall gain significant investment incentives while setting up retail outlets in Vietnam upon the expiry of the aforementioned 5-year period.

> Conclusion

Decree 09 reveals itself as an acceleration but also at the same time a slow-down feature to foreign players in conquering Vietnam's distribution markets.

Rödl & Partner Vietnam accompanies clients of all kinds in their distribution activities in Vietnam.



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